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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Petitioners,

v.

STATE OF ALABAMA AND
STATE DEPARTMENT OF REVENUE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

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REPLY BRIEF FOR PETITIONERS

Respondents have filed what surely must be one of the oddest briefs the Court will receive this Term. Having spent nearly a decade entangling petitioners in disputes over state-law res-judicata principles and insisting that Alabama's franchise tax scheme does not offend the Commerce Clause under this Court's precedents, respondents now expressly decline to defend the Alabama Supreme Court's decision on either of those grounds. *See* Br. 3. Instead, in an act of apparent desperation, respondents offer up lengthy arguments on three questions that they never raised below, that the Alabama Supreme Court did not address, and that this Court did not agree to review. Indeed, in violation of this Court's Rule 15.2, respondents failed to raise these questions even in their brief in opposition to certiorari, thereby depriving petitioners of an opportunity to address them in their opening brief. In light of respondents' defaults, this Court may—and should—decline to reach any of these issues.

In any event, each of respondents' new arguments founders on binding precedent. *First*, contrary to respondents' claim that the Alabama Supreme Court lacked jurisdiction over this case, that court itself has conclusively ruled—in decisions that respondents fail to mention—that the constitutional provision on which they predicate their argument has no application to judicial-review proceedings brought under the statutory provisions that petitioners invoked in this case.

Second, nothing in this Court's precedents—or even in the dissent in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), on which respondents rely—remotely supports their request that the Court overrule *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), and hold that the Eleventh Amendment prohibits this Court from exercising appellate jurisdiction to review federal constitutional questions decided by a state court in the State's favor.

Third, while conceding that the decision below cannot be squared with this Court's Commerce Clause precedents, respondents invite the Court to repudiate its entire negative Commerce Clause jurisprudence. But this Court has consistently rejected similar suggestions in the past, and this case—involving a tax that is both blatantly discriminatory and indistinguishable from other taxes the Court has struck down repeatedly and recently—is an especially inappropriate vehicle for any such wholesale reconsideration of long-settled constitutional principles.

Despite respondents' unwillingness to defend the judgment below on either of the issues on which this Court granted certiorari, the Court *should* address them. Any disposition short of a decision on the merits would effectively reward a litigation strategy in which a respondent, in disregard of this Court's rules, opposes certiorari on the merits of the questions presented by the petition but then, *after* certiorari has been granted, abandons any defense on

the merits and manufactures new arguments never raised before in the hope of avoiding or delaying an adverse disposition on the questions the Court has agreed to review. *See Lawrence v. Chater*, 116 S. Ct. 604, 607, 610 (1996) (per curiam).

This Court should therefore decline to reach respondents' three eleventh-hour arguments, should instead decide the questions on which it granted certiorari, should reject the arguments that respondents made on those questions in the courts below and in their opposition to certiorari, and should remand for further proceedings, including the provision of meaningful backward-looking relief.

I. THE COURT SHOULD NOT REACH RESPONDENTS' STATE-LAW JURISDICTION ARGUMENT, WHICH IN ANY EVENT IGNORES CONTROLLING ALABAMA SUPREME COURT PRECEDENT.

Respondents argue that, under state law, the Alabama Supreme Court lacked jurisdiction over this case, and that this Court therefore also lacks jurisdiction. *See* Br. 7-14. Respondents predicate their argument on Section 14 of the Alabama Constitution, which provides that "the State of Alabama shall never be made a defendant in any court of law or equity." Ala. Const. Art. I, § 14. Because of that clause, respondents say, the Alabama courts necessarily lacked jurisdiction over the State and the Department of Revenue—the only state parties, according to respondents, who were before the Alabama Supreme Court. *See* Br. 7-9. Although respondents acknowledge that they never raised this argument in the state courts or in their opposition to certiorari, they assert that this Court must nevertheless address it because it goes to jurisdiction. *See* Br. 12-13.

But there is no cause for this Court to grapple with this state-law issue. Even if the Court were prepared to overlook respondents' failure, in clear violation of Rule 15.2, to raise this issue in their brief in opposition, this Court does not address, in any but the most "exceptional cases,"

questions that a respondent raises here for the first time. *Kentucky v. Stincer*, 482 U.S. 730, 747 n.22 (1987). That rule applies with "peculiar force" in "cases coming here from state courts." *See McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). There is of course nothing "exceptional" about the issue respondents raise, which is one purely of state law. *See Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86 (1988) ("we are especially disinclined to become involved in resolving disputes about Texas law that should have been presented to the state courts").[1]

Respondents assert, however, that this Court is *required* to address an argument raised here for the first time if it goes to the jurisdiction of the court below—even if the case comes from a state court.[2] But respondents do not cite a single case in which this Court has ever second-guessed the jurisdiction of a state court where the state court itself had not found jurisdiction lacking.[3] More

[1] Indeed, because respondents seek to alter the judgment entered below (from an affirmance to a dismissal), it is not clear that they could have raised this point in any way other than by filing a cross-petition. *See generally* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 363-64 (7th ed. 1993).

[2] The premise of this argument—that under Alabama law sovereign immunity is "both jurisdictional and not waivable" (Resp. Br. 4)—is by no means as clear as respondents portray it. *See State Dep't of Revenue v. Price-Williams*, 594 So.2d 48, 51 (Ala. 1992) ("Sovereign immunity is an affirmative defense. It is waived if it is not affirmatively pleaded at the trial court level.") (citations omitted).

[3] Where a state court has dismissed an appeal on grounds of jurisdiction, that is of course an independent state-law ground. *See* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 115 (7th ed. 1993). That is what had happened in each of the cases coming from a state court cited by respondents at page 10 of their Brief. *See Palmer v. Ohio*, 248 U.S. 32, 33 (1918) ("[t]he Supreme Court of the state affirmed the action of the lower courts in dismissing the petition on the ground that the state had not consented so to be sued"); *Callan v. Bransford*, 139 U.S. 197, 198 (1891) (cases "were dismissed by the [state] court of appeals upon the ground that . . . the amount in controversy in each case was less than sufficient to give the court jurisdiction"); *Smith v. Adsit*, 83 U.S. (16 Wall.) 185, 188 (1873) ("He then appealed to the Supreme Court of the State, where . . . the bill was dismissed as to him . . . for want of jurisdiction."); *Semple v. Hagar*, 71 U.S. (4 Wall.) 431, 434-35 (1867) ("State court . . . refused to take jurisdiction of the case."); *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 530 (1858) ("the case was thereupon dismissed, for want of jurisdiction"); *President & Dirs. of the Bank of Washington v. Arkansas*, 61 U.S. (20 How.) 530, 532 (1858) ("it was dismissed by the State court for want of jurisdiction").

significantly, *Heath v. Alabama*, 474 U.S. 82 (1985), is directly to the contrary. There, too, an argument that Alabama courts lacked jurisdiction was made here for the first time, but this Court—at the urging of the State of Alabama, whose position in *Heath* was directly contrary to its position here[4]—declined to address it, proceeding directly to the merits. "Even if we were not jurisdictionally barred from considering claims not pressed or passed upon in the state court," the Court explained, "the longstanding rule that this Court will not consider such claims creates, at the least, a weighty presumption against review." *Id.* at 87. *Heath* thus establishes that questions going to the jurisdiction of a state court are waived unless they are raised there first.

The illogic of respondents' contrary position is made obvious by their concession that, "in cases coming from state supreme courts, this Court lacks the power to review and correct jurisdictional determinations actually made in the court below." Br. 10 n.4. Respondents do not explain why this Court *must* review an issue of state-law jurisdiction if the state court has not addressed it, whereas it *may not* review such an issue where the state court has addressed it.

[4] The State of Alabama, as the respondent in *Heath*, argued that, because "[n]o question of jurisdiction was decided in the court below[,] . . . [t]he question of jurisdiction is . . . not before this court." Brief for Respondent at 33, *Heath v. Alabama*, No. 84-5555 (filed June 11, 1985).

Nor do respondents explain why a state-court decision reaching the merits of a dispute should not be understood to embody an implicit determination that the court has jurisdiction—a determination of state law that, in respondents' words, "this Court lacks power to review." Br. 10 n.4.

If the Court does consider the merits of respondents' argument, it will find that their jurisdictional theory rests on a mistaken reading of Section 14.[5] The Alabama Supreme Court has held repeatedly that Section 14's proscription against making the State "a *defendant* in any court" is no obstacle to making the State an *appellee* on judicial review of agency action. As explained in *State v. Louis Pizitz Dry Goods Co.*, 11 So.2d 342 (Ala. 1943), the State in such a proceeding is "not thereby made a party defendant in violation of section 14 of the Constitution, but is the appellee on an appeal in which it already is a party." *Id.* at 346; *see State v. Norman Tobacco Co.*, 142 So.2d 873, 875 (Ala. 1962) ("not a suit against the State"); *Metcalf v. Department of Indus. Relations*, 16 So.2d 787, 790 (Ala. 1944) ("These proceedings are in effect only an appeal from the order of the Department of Industrial Relations .... This is not forbidden by § 14 of the Constitution.").[6]

The judicial-review procedures invoked by petitioners are squarely within that rule. Petitioners brought these consolidated cases in the Alabama Circuit Court, each time naming the "State of Alabama, Department of Revenue" as "respondent/appellee," seeking judicial review of two sets of decisions of the Alabama Department of Revenue.[7] *First*, petitioners sought review of five "final assessments,"[8] invoking Ala. Code § 40-2-22.[9] That section provides that "[e]ither the state or the taxpayer may appeal from any final assessment" and requires the State of Alabama (not a state officer) to be named as the appellee.[10] In two of the decisions discussed above, *Louis Pizitz* and *Norman Tobacco*, the Alabama Supreme Court re-

[5] The Court therefore need not decide whether the imposition of a Section 14 bar would violate federal law. *See Reich v. Collins*, 513 U.S. 106, 109-10 (1994).

[6] Respondents' failure to bring these decisions to the Court's attention is particularly striking in light of their sweeping pronouncements about Alabama law. *See* Br. 2 ("it is clear from ... the Alabama Supreme Court's uniform decisions ... that the Alabama Supreme Court itself lacked jurisdiction"); Br. 14 ("the Alabama Supreme Court's consistent decisions ... leave no room for doubt that the Alabama Supreme Court lacked jurisdiction"); Br. 14 n.7 ("there can be no question that the Alabama Supreme Court must dismiss this case for lack of jurisdiction at the first opportunity on remand").

[7] *See generally Melof v. Hunt*, 718 F. Supp. 877, 880-84 (M.D. Ala. 1989) (explaining different kinds of review proceedings available under Alabama law). In addition to the eight proceedings addressed in the text, the BellSouth petitioners also brought two proceedings (pursuant to Ala. Code § 40-1-11, repealed in 1992) against the State, the Department, and the Commissioner in connection with certain taxes paid under protest in 1990 and 1991. *See* No. CV-90-1591 (Rec. 30, 473, 1033, 1844); No. CV-91-1079 (Rec. 524, 1838). Because the Alabama courts' jurisdiction with respect to the eight proceedings discussed in the text is so plain, there is no need to address these two additional proceedings.

[8] *See* No. CV-89-2600 (BellSouth petitioners, tax year 1989) (Rec. 1, 4, 465, 1850); No. CV-90-1711 (BellSouth petitioners, tax year 1990) (Rec. 101, 117, 470, 1832); No. CV-90-2555 (CSX petitioners, tax year 1989) (Rec. 130, 152, 170, 367, 1024, 1818); No. CV-90-2556 (CSX petitioners, tax year 1990) (Rec. 145, 256, 275, 331, 1031, 1828); No. CV-91-2151 (CSX petitioners, tax year 1991) (Rec. 702, 707, 727, 738, 757, 766, 786, 815, 1026, 1808).

[9] Effective October 1, 1992, Section 40-2-22 was superseded by Section 40-2A-7(b)(5), as part of the enactment of the Alabama Taxpayers' Bill of Rights and Uniform Revenue Procedures Act. Section 40-2A-7(b)(5) provides for substantially the same procedure as Section 40-2-22.

[10] *See, e.g., Birmingham Vending Co. v. State*, 38 So.2d 876, 879 (Ala. 1949) ("That statute shows clearly that the parties to it are the State and taxpayer."); *Rutledge Petroleum Corp. v. F&W Trucking*, 545 So.2d 60, 62 (Ala. Civ. App. 1988) ("The proper parties to an appeal pursuant to section 40-2-22 are the State of Alabama and the taxpayer.").

jected a Section 14 challenge to this very assessment-appeal procedure.[11]

Second, petitioners sought review of three orders denying their petitions for tax refunds.[12] For this purpose, petitioners invoked the default judicial-review provisions of the Alabama Administrative Procedure Act ("APA"), Ala. Code § 41-22-20, which similarly requires that "[t]he petition for review shall name the agency as respondent," *id.* § 41-22-20(h).[13] Although we have found no case expressly addressing the constitutionality of Section 41-22-20 (the Alabama APA), that provision contemplates the same kind of appeal procedure as that prescribed by Section 40-2-22. The cases discussed above (*Louis Pizitz*

[11] At the time *Louis Pizitz* and *Norman Tobacco* were decided, the procedure was set forth in Ala. Code of 1940, tit. 51, § 140. In all relevant respects, Section 140 was identical to Section 40-2-22.

[12] *See* No. CV-91-397 (South Central Bell, tax years 1986-88) (Rec. 429, 436, 459, 502, 1019, 1822); No. CV-90-2558 (CSX petitioners, tax years 1982-85) (Rec. 137, 177, 213, 397, 1021, 1813); No. CV-90-2557 (CSX petitioners, tax years 1986-88) (Rec. 141, 223, 249, 419, 1028).

[13] At the time these actions were filed, Alabama law did prescribe the procedure by which the Department of Revenue was to consider a refund petition, *see* Ala. Code § 40-1-34, but it did not specifically address the appropriate mechanism for seeking judicial review of the Department's disposition of such a petition. The Department's own regulations therefore instructed taxpayers to use the default procedure set forth in the Alabama APA to appeal a decision denying a refund request. *See* Ala. Tax Reg. 810-1-3-.13(1)(b) (repealed May 6, 1993) ("In all contested cases involving refunds, . . . the taxpayer may appeal from the final order of the Department as provided by Code of Ala. 1975, § 41-22-20."). Out of an abundance of caution, petitioners also invoked Section 40-2-22 (concerning final assessments), and filed petitions for mandamus against the Commissioner of Revenue (the judicial-review vehicle that had been used before the Alabama APA took effect in 1982). *See generally Sparks v. Louisville & N.R.R.*, 166 So.2d 865, 866 (Ala. 1964); *Haden v. Rhodes*, 123 So.2d 916, 918 (Ala. 1960). Effective 1992, Section 40-1-34 was superseded by Section 40-2A-7(c), which expressly makes available the same kind of judicial-review procedure as that applicable to final assessments. *See* Ala. Code § 40-2A-7(c)(5)(b).

and *Norman Tobacco*, further confirmed by *Metcalf*) should therefore equally immunize the APA from Section 14 attack.

On the strength of *Louis Pizitz*, *Norman Tobacco*, and *Metcalf*—none of which has ever been questioned—the Alabama courts have entertained countless tax appeals in cases like this, in which the State or the Department of Revenue was named as an appellee or respondent.[14] Respondents' attempt to wish away this long history of judicial review in Alabama is entirely meritless.[15]

[14] *See, e.g., Turner v. State Dep't of Revenue*, 643 So.2d 568 (Ala. 1994); *Champion Int'l Corp. v. State*, 405 So.2d 932 (Ala. 1980); *Butler & Kennamer Wholesale Co. v. State*, 301 So.2d 178 (Ala. 1974); *Morgan v. State*, 194 So.2d 820 (Ala.), *cert. denied*, 389 U.S. 7 (1967); *Hispan Corp. v. State Dep't of Revenue*, 709 So.2d 1233 (Ala. Civ. App. 1997), *cert. denied*, No. 1962057 (Ala. 1998); *Mead Coated Bd., Inc. v. Department of Revenue*, 701 So.2d 10 (Ala. Civ. App.), *cert. denied*, No. 1961213 (Ala. 1997); *LL&E Petroleum Mktg., Inc. v. State Dep't of Revenue*, 683 So.2d 978 (Ala. Civ. App. 1995), *rev'd on other grounds*, 683 So.2d 980 (Ala. 1996); *Marks-Fitzgerald Furniture Co. v. State Dep't of Revenue*, 678 So.2d 121 (Ala. Civ. App. 1995), *cert. denied*, No. 1950623 (Ala. 1996); *AT&T Communications of the South Central States, Inc. v. State Dep't of Revenue*, 677 So.2d 772 (Ala. Civ. App. 1995), *cert. denied*, No. 1950633 (Ala. 1996). Indeed, in at least one such case, this Court reviewed the Alabama Supreme Court's judgment on the merits. *See Dunbar-Stanley Studios, Inc. v. State*, 210 So.2d 696 (Ala. 1968), *aff'd*, 393 U.S. 537 (1969).

[15] Because it is clear that the State and the Department of Revenue are properly before it, this Court need not address whether the Commissioner is also a party before the Court. Contrary to respondents' assertion, however, it is quite plain that he is a party here. Respondents (Br. 2 n.1) rely on *Sperau v. Ford Motor Co.*, 674 So.2d 24 (Ala. 1995), *vacated on other grounds*, 517 U.S. 1217 (1996), which purported to require that a notice of appeal specifically list each appellee. But *Sperau* has no application here: in *Sperau* itself and in each of the cases on which *Sperau* relied, the appellant had failed to signal any intent to appeal the judgment or order affecting a particular party. *See* 674 So.2d at 40. By contrast, petitioners' notice of appeal specifically listed the docket numbers of all consolidated cases decided by the trial court (in-

II. THE COURT SHOULD NOT REACH RESPONDENTS' ELEVENTH AMENDMENT ARGUMENT, WHICH IN ANY EVENT IS MERITLESS.

Respondents next argue that this is a "suit . . . against one of the United States" within the meaning of the Eleventh Amendment, and that this Court therefore may not hear it. *See* Br. 15-27. In particular, respondents claim that the Eleventh Amendment not only bars suits against States commenced in the lower federal courts, but also strips this Court of the ability to review state-court decisions in which a State has prevailed. *See* Br. 16-17. But there is no reason for the Court to reach that issue, and it should not do so: under Rule 15.2, respondents "waived this argument by failing to raise it in [their] brief in opposition to the petition for certiorari." *Knowles v. Iowa*, 119 S. Ct. 484, 487 n.2 (1998); *see Howlett v. Rose*, 496 U.S. 356, 381 n.24 (1990) (refusing, under Rule 15.2, to

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cluding the five in which the Commissioner was a party), the notice stated that petitioners were appealing from the "single judgment affecting all [consolidated] cases," and petitioners served the notice on counsel who had represented the Commissioner throughout the trial-court proceedings (the same counsel who represented the State and the Department). *See* Rec. 2271-74. The caption of the notice of appeal was simply copied from the trial court's decision, which omitted the Commissioner. *See* Rec. 2275. Moreover, there is no reason to believe that *Sperau*'s requirement cannot be waived; thus, by failing to raise the issue below, the Commissioner's attorneys waived any defect. *See State v. National Cash Credit Ass'n*, 141 So. 541, 543 (Ala. 1932). Finally, *Sperau* was decided after petitioners filed their notice of appeal and therefore cannot be allowed to bar review. *See Reich*, 513 U.S. at 113 ("[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court") (internal quotation marks omitted). In sum, the Commissioner plainly *was* a party in the Alabama Supreme Court and is therefore a party here as well. *See* Sup. Ct. R. 12.6. Although petitioners neglected to include the Commissioner among the parties named in the Rule 24.1(b) list in their opening brief (*see* Br. ii), the omission was inadvertent and should have no effect on this Court's jurisdiction. *Cf. Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 221 n.6 (1985).

reach argument that "school board is an arm of the State and thus is not a person under § 1983").

Respondents imply that the Eleventh Amendment issue is "jurisdictional" for purposes of Rule 15.2 and therefore cannot be waived, *see* Br. 15 n.9, but that is not so. Although the Court has stated that an Eleventh Amendment defense "sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court," *Edelman v. Jordan*, 415 U.S. 651, 678 (1974), the Court has "never held that it is jurisdictional in the sense that it must be raised and decided by this Court on its own motion," *Patsy v. Board of Regents*, 457 U.S. 496, 515 n.19 (1982); *see Wisconsin Dep't of Corrections v. Schacht*, 118 S. Ct. 2047, 2052 (1998) ("Unless the State raises the matter, a court can ignore it."). Indeed, the Court in *Patsy* declined to address an Eleventh Amendment issue because the State had failed to reiterate the argument in its merits brief—even though the State *had* raised the point in its brief at the certiorari stage. *See Patsy*, 457 U.S. at 515 n.19; *id.* at 523 & n.6 (Powell, J., dissenting). If the Court may pretermit an Eleventh Amendment issue in the circumstances in *Patsy*, it certainly has that discretion here.[16]

In any event, respondents concede that their proposed rule runs headlong into *McKesson Corp. v. Division of*

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[16] Strict enforcement of Rule 15.2 is particularly appropriate in the Eleventh Amendment context, where members of this Court have expressed distinct reluctance to resolve important issues on less than full briefing. *See, e.g., Schacht*, 118 S. Ct. at 2057 (Kennedy, J., concurring) ("the proper course is for us to defer addressing the [Eleventh Amendment] question until it is presented for our consideration, supported by full briefing and argument, in some later case"); *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 496 (1987) (Scalia, J., concurring in part and concurring in the judgment) (finding invitation to overrule Eleventh Amendment precedent to raise "complex enough questions that I am unwilling to address them in a case whose presentation focused on other matters"); *Patsy*, 457 U.S. at 515 n.19 (declining to address Eleventh Amendment defense because "the parties have not briefed the issue").

Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990), in which this Court squarely held that "[t]he Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts." *Id.* at 31. There simply is no good cause to rethink *McKesson*. Unlike the "splintered decision" overruled in *Seminole Tribe*, 517 U.S. at 66 (internal quotation marks omitted), *McKesson* was decided by a unanimous vote, and it has not in any way proved "unworkable," *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

Contrary to respondents' suggestion (Br. 18), the *McKesson* Court did not misread *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). The Court expressly recognized that *Cohens* involved "a proceeding commenced in the first instance by the State itself against a citizen" and that "the [*Cohens*] Court's holding might be read as limited to that circumstance." 496 U.S. at 27. Despite that acknowledgment, the *McKesson* Court noted the settled understanding of individual Justices and its "consistent practice" of reviewing state-court decisions in which a State has prevailed, even where the State was a defendant. *Id.* The Court concluded that it was simply too late in the day to turn back on a practice that was both tested by time and central to "this Court's role in our federal system." *Id.* at 28. The argument to the contrary has become no stronger with the passage of eight years.

Justice Souter's dissent in *Seminole Tribe* cannot help respondents. Although he criticized the reasoning in *McKesson*, *see id.* at 113 n.10, Justice Souter did not quarrel with the result in that case. His position was that this Court fundamentally misread the Eleventh Amendment in *Hans v. Louisiana*, 134 U.S. 1 (1890), *see Seminole Tribe*, 517 U.S. at 117, and that, properly understood, the Eleventh Amendment affects only suits against States in which federal jurisdiction rests solely on diversity, *see id.* at 109-16—a view that, if adopted by the full Court, would leave respondents here without *any* Eleventh Amendment protection. Moreover, Justice Souter argued not for

overruling *Hans* (only against extending it), *see id.* at 130, 159, 183, and nothing in his opinion suggests that he would favor overruling *McKesson* either—particularly without first overruling *Hans*.

Even if the Court were otherwise open to reconsidering *McKesson*, this case would be an especially poor vehicle for doing so because, even if the Court were to overrule that decision, the result here would remain the same. The Court would still have to decide whether, for purposes of the Eleventh Amendment, the state-court appeal procedures invoked in this case amount to a "suit . . . commenced or prosecuted against one of the United States." This Court has long allowed the answer to such questions to be informed by relevant state law. *See, e.g., Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). Thus, in *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945), the Court determined that a particular state statute "clearly provide[d] for an action against the state" because "[n]o state court decision . . . indicate[d] that a different interpretation of this statute has been adopted by state courts." *Id.* at 463. Here, in contrast, the Alabama courts have unambiguously determined that the kind of state-court proceeding at issue simply "is not a suit against the State." *Norman Tobacco*, 142 So.2d at 875.

III. THE COURT SHOULD NOT REACH RESPONDENTS' COMMERCE CLAUSE ARGUMENT, WHICH IN ANY EVENT IS MERITLESS.

Respondents concede that there is no "flaw" in petitioners' claim that Alabama's franchise tax scheme is unconstitutional under "this Court's recent negative Commerce Clause cases." Br. 3. They seek to avoid the consequences of that concession, however, by asking the Court to overturn the settled doctrine that the Commerce Clause by its own force imposes certain restraints on state power. *See* Br. 28-50. The Court need not and should not address this argument either. Respondents waived the argument

by failing to raise it in their brief in opposition, *see* Sup. Ct. R. 15.2, and they failed to raise the point even in the Alabama courts, though they were plainly required to preserve it there, *see Illinois v. Gates*, 462 U.S. 213, 220-23 (1983).

In any event, respondents' argument is meritless. From time to time throughout its history, the Court has heard similar broadside attacks on the legitimacy of its Commerce Clause doctrine, but the Court has never seriously entertained any of them. Just two Terms ago, for example, the Court observed that it had long endorsed the view that "the Commerce Clause had not only granted Congress express authority to override restrictive and conflicting commercial regulations adopted by the States, but that it also had immediately effected a curtailment of state power." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S. Ct. 1590, 1596 (1997). "Our decisions on this point," the Court explained, "reflect '*upon fullest consideration*, the course of adjudication unbroken through the Nation's history.'" *Id.* (quoting *Freeman v. Hewit*, 329 U.S. 249, 252 (1946)) (emphasis added).

Similarly, a half-century earlier, in response to dissents of Justices Black and Douglas, who questioned the foundations of the Court's dormant Commerce Clause jurisprudence, the Court stated: "For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, . . . affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests." *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945).

And the case for the negative Commerce Clause does not rest solely on its longevity. In *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), the Court, after noting that it had "consistently" construed the Commerce Clause as "prohibiting certain state taxation even

when Congress has failed to legislate on the subject," described the underlying justification for its negative Commerce Clause jurisprudence:

> We have understood this construction to serve the Commerce Clause's purpose of preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.

Id. at 179-80.

Indeed, the Court has stated that "[t]he 'negative' aspect of the Commerce Clause was considered the more important by the 'father of the Constitution,' James Madison." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994).[17] In implementing this "negative aspect" of the Commerce Clause, "[p]erhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949).

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[17] As the Court further explained: "In one of his letters, Madison wrote that the Commerce Clause 'grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government.' 3 M. Farrand, Records of the Federal Convention of 1787, p. 478 (1911)." 512 U.S. at 193 n.9. Professor Regan has similarly observed that "[t]here is much evidence that the main point of this grant (unlike the grant of power over foreign commerce) was not to empower Congress, but rather to disable the states from regulating commerce among themselves." Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1125 (1986) (citing Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 481-94 (1941)).

Even if the Court were prepared to rethink its settled precedent, the reliance interests of an entire economy structured around the negative Commerce Clause doctrine would weigh heavily against abandoning it. For example, in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Court refused to overrule *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), which had held that the Commerce Clause precludes a State from requiring a mail-order seller with no physical presence in the State to collect and pay a use tax on goods sold to purchasers within the State. Central to the *Quill* Court's reasoning was that "the *Bellas Hess* rule has engendered substantial reliance and has become part of the basic framework for a sizable industry," 504 U.S. at 317, and that "[t]he 'interest in stability and orderly development of the law' that undergirds the doctrine of *stare decisis* therefore counsels adherence to settled precedent," *id.* (citation omitted); *see also id.* at 320 (Scalia, J., concurring in part and concurring in the judgment). The dislocations that the *Quill* Court was unwilling to inflict on the mail-order industry would of course be nothing compared to the chaos that a wholesale abandonment of the negative Commerce Clause doctrine would visit upon the economy at large. Moreover, Congress always retains the "ultimate power" to overturn through legislation the effect of any of this Court's Commerce Clause rulings—a fact that has diminished the Court's inclination to reconsider its established precedents. *See Quill*, 504 U.S. at 318; *see also id.* at 320 (Scalia, J., concurring in part and concurring in the judgment).

Furthermore, even if the Court were inclined to reconsider the theoretical underpinnings of its negative Commerce Clause jurisprudence, this would be a wholly inappropriate case in which to do so. Quite apart from the fact that respondents' failure to raise the issue in a timely manner has deprived the Court of full briefing, the discriminatory nature of the franchise tax scheme at issue makes this case a particularly ill-suited vehicle for re-examining Commerce Clause precedents. Even members of this Court who have criticized the dormant Commerce Clause doctrine have recognized that facially discriminatory taxes are unconstitutional. *See Associated Indus. of Missouri v. Lohman*, 511 U.S. 641 (1994) (opinion of Thomas, J., reflecting views of eight Justices, with Justice Blackmun concurring in the judgment without opinion); *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988) (opinion of Scalia, J., speaking for a unanimous Court); *see also Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996) (unanimous opinion). Justice Scalia, for example, has consistently stated that he will concur in decisions striking down taxes that reflect "rank" or "facial" discrimination.[18]

Justice Scalia has also indicated that, in Commerce Clause cases, "*stare decisis*—that is to say, a respect for the needs of stability in our legal system—would normally cause me to adhere to a decision of this Court already rendered as to the unconstitutionality of a particular type of state law." *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 204 (1990) (Scalia, J., concurring in the judgment). Thus, Justice Scalia (joined by Justice Thomas) has explained:

> I will, on *stare decisis* grounds, enforce a self-executing "negative" Commerce Clause in two situations: (1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court.

West Lynn Creamery, 512 U.S. at 210 (Scalia, J., concurring in the judgment).[19]

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[18] *See, e.g., Amerada Hess Corp. v. Director, Div. of Taxation*, 490 U.S. 66, 80 (1989) (Scalia, J., concurring in the judgment); *Goldberg v. Sweet*, 488 U.S. 252, 271 (1989) (Scalia, J., concurring in the judgment); *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part).

[19] Throughout our constitutional history, other Justices who have questioned the legitimacy of the Court's broad negative Commerce

The tax at issue in this case satisfies both criteria: it facially discriminates against interstate commerce, *see* Pet. Br. 26-27, and respondents have conceded that the tax is indistinguishable from taxes the Court has invalidated under the negative Commerce Clause, *see* Br. 3. Accordingly, even if the Court were willing to revisit its negative Commerce Clause jurisprudence, this would be a particularly inapt case to use for that purpose.

Clause doctrine have similarly limited their criticism to the Court's invalidation of *nondiscriminatory* exactions. *See, e.g., Southern Pac.*, 325 U.S. at 795 (Douglas, J., dissenting) ("courts should intervene only where the state legislation discriminated against interstate commerce or was out of harmony with laws which Congress had enacted"); *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 327 (1938) (Black, J., dissenting in part) ("Until Congress . . . fixes a different policy, it would appear desirable that the States should remain free to adopt tax systems imposing uniform and nondiscriminatory taxes upon interstate and intrastate business alike."); *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489, 500 (1887) (Waite, C.J., dissenting) ("[t]here is no discrimination between citizens of the state and citizens of other states"); *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 282 (1873) (Swayne, J., dissenting) ("That no discrimination is made between freight carried wholly within the State, and that brought into or carried through or out of it, . . . is conclusive on the subject.").

CONCLUSION

The judgment of the Alabama Supreme Court should be reversed. The case should be remanded for further proceedings, including the provision of meaningful backward-looking relief.

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